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Based on this article, Ms. Dang has been honored as a recipient of the first annual Patsy Ford & David Bloodworth Memorial Scholarship. Ms. Dang expresses sincere appreciation to Professor Jim Rossi for his guidance in developing this article.

NEW POWER, FEW NEW LINES: A NEED FOR A FEDERAL SOLUTION

HOANG DANG*

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I. INTRODUCTION

New power, few new lines.[1] This simple statement sums up the present situation facing the electricity industry as it moves from a highly regulated, monopolistic industry towards a deregulated, competitive one. According to the North American Electric Reliability Council (NERC), the electric transmission capacity in the United States is not keeping pace with the increase in electric generation.[2] The federal government, through the Public Utilities Regulatory Policy Act of 1978,[3] Energy Policy Act of 1992,[4] and

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* J.D., The Florida State University College of Law (April 2002). Based on this article, Ms. Dang has been honored as a recipient of the first annual Patsy Ford & David Bloodworth Memorial Scholarship. Ms. Dang expresses sincere appreciation to Professor Jim Rossi for his guidance in developing this article.

1. "New power, few new lines" is a statement from an article published by the *Washington Post* commenting on the state of the electricity industry. Peter Behr, *For Operators, a Daily High-Wire Act*, WASH. POST, Aug. 22, 2001, at A1.

2. N. AM. ELEC. RELIABILITY COUNCIL, RELIABILITY ASSESSMENT 2001-2010 5 (2001).

3. Public Utilities Regulatory Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.).

4. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended

Order No. 888,[5] successfully increased access to transmission lines, resulting in the rise of independent power producers.[6] However, this success has not come without a price. As more power is generated, more electricity is transferred along high-voltage transmission lines. This has placed a strain on the nation's transmission system and has resulted in transmission congestion, known as bottlenecks.[7] Consequently, the benefits of competition are negated by the inability of consumers to obtain the cheaper electricity.[8] Instead of lower prices, the retail price of electricity has actually increased in some areas of the country due to shortages and blackouts caused by the strain on the transmission grid.[9]

In response to this problem, the Federal Energy Regulatory Commission (FERC) issued Order No. 2000, encouraging the formation of regional transmission organizations (RTOs).[10] The FERC believes that transmission congestion is largely due to persistent discrimination by public utility monopolies reluctant to share their transmission lines with wholesale competitors.[11] Thus, RTOs will operate transmission facilities in a particular region, providing full and open access to all market participants in the region.[12] However, the FERC also realizes that construction of new transmission lines will have to occur in order to keep up with the increase in electricity generation.[13] Consequently, RTOs are responsible for the planning and expansion of transmission lines.[14]

Nevertheless, in order to truly provide RTOs with the mechanisms to expand the transmission system, federal jurisdiction over transmission must be expanded to allow the federal government to address the problems associated with expansion of the transmission grid. Electric transmission capacity is not keeping up with the increase in electric generation because utilities do not have the incentive to invest in the expansion of the transmission grid. In addition, state siting processes pose many barriers to any

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in scattered sections of 16 U.S.C., 25 U.S.C., 26 U.S.C., 30 U.S.C., and 42 U.S.C.).

5. FERC Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385).

6. *See infra* Part II.A.

7. Behr, *supra* note 1.

8. *Id.*

9. *Id.*

10. FERC Order No. 2000, 65 Fed. Reg. 810 (Dec. 20, 1999) (to be codified at 18 C.F.R. pt. 35).

11. Fred Bosselman, Jim Rossi & Jacqueline Land Weaver, Energy, Economics and the Environment 767, 771-73 (2000) [hereinafter ENERGY].

12. FERC Order No. 2000, 65 Fed. Reg. 810 (Dec. 20, 1999) (to be codified at 18 C.F.R. pt. 35).

13. ENERGY, *supra* note 11, at 773.

14. FERC Order No. 2000, 65 Fed. Reg. 810 (Dec. 20, 1999) (to be codified at 18 C.F.R. pt. 35).

attempt to construct an interstate transmission line. An attempt to construct transmission lines across state boundaries may be impeded by a state's ability to deny or delay approval for such construction. Under current law, the FERC is limited in its ability to solve such problems. States have exclusive jurisdiction over transmission siting, and the FERC has no authority under the Federal Power Act[15] to order the construction or expansion of transmission facilities, nor does it have authority to approve transmission siting.[16]

This paper argues that the Federal Power Act should be amended to authorize the FERC to both order the construction and expansion of the transmission grid and grant siting approval. However, the states' interests in protecting their citizens should not be ignored. Transmission siting certainly affects local communities, with respect to the health, safety, and environmental impacts of transmission lines. Thus, states should retain jurisdiction to determine whether the location of the transmission corridor is reasonable in relation to the local zoning laws, environmental regulations, and state comprehensive plans.

Section II describes the federal policy developments that have led to the increase in electricity generation, the strain this has caused on the transmission system, the FERC's response to the problem, and the current development of RTOs. Section III discusses federal and state jurisdiction in the area of transmission, examines some of the problems associated with interstate siting of transmission lines, and explores possible solutions. Section IV argues that states should work to improve their siting processes and that an amendment to the Federal Power Act, providing the FERC with increased authority over transmission, is necessary. Section V argues that increased federal authority over transmission siting is well within the powers of Congress under the Commerce Clause and Tenth Amendment.

15. Federal Power Act, ch. 285, 41 Stat. 1063 (1920) (codified as amended in scattered sections of 16 U.S.C.).

16. Richard J. Pierce, Jr., *The State of the Transition to Competitive Markets in Natural Gas and Electricity*, 15 ENERGY L.J. 323, 330-33 (1994) (predicting that the allocation of jurisdictional power in the electric industry will prove to be a source of major problems to energy deregulation).

II. BACKGROUND

A. Federal Policy Developments

Historically, the electricity industry consisted primarily of investor-owned public utilities controlling all three components of the electricity industry: generation, transmission, and distribution.[17] The public utility enjoyed a monopoly within its designated service territory, but, in return, it had a duty to serve the members of the public in its service territory and was subject to extensive regulation by state regulatory authorities.[18] Today, however, the landscape of the electricity industry has changed significantly. Although there are still many vertically integrated utilities that control or own generation, transmission, and distribution facilities, there now exists many more independent power products concentrating only on the generation of electricity.[19]

Three federal policy developments were instrumental in increasing the number of independent power producers.:

1. PURPA

The Public Utilities Regulatory Act of 1978 (PURPA)[20] was instrumental in promoting competition in the generation of electricity because it led to an increase in the number of independent power generators. PURPA derived from the energy crisis of the 1970s and was designed to reduce the nation's reliance on foreign petroleum imports and stimulate the development of alternative sources of electricity.[21] Section 210 of PURPA authorizes the FERC to require utilities to purchase electricity from "qualifying facilities" (QFs). In addition, the FERC promulgated rules that encouraged the growth of QFs by requiring utilities to purchase power from QFs at a price known as "avoided costs," the costs at which a utility would have had to pay for electricity.[22] The result was that independent power producers enjoyed a competitive advantage because the utilities entered into long-term purchasing

17. ENERGY, *supra* note 11, at 659.

18. *Id.* at 146.

19. *Id.* at 718-19.

20. Public Utilities Regulatory Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 16 U.S.C.).

21. *See* Justin M. Nesbit, Note, *Commerce Clause Implications of Massachusetts' Attempt to Limit the Importation of "Dirty" Power in the Looming Competitive Retail Market for Electricity Generation*, 38 B.C. L. REV. 811, 815-16 (1997) (discussing the PURPA and EPAct's contribution to retail competition through open access of the transmission grid).

22. *Id.* at 816.

contracts with QFs at an "avoided cost rate" which exceed the utilities' "true avoided cost."[23]

2. Energy Policy Act of 1992

Another important piece of federal legislation is the Energy Policy Act of 1992 (EPAct), which authorizes the FERC to mandate wheeling for wholesale customers and suppliers (a public utility must transfer electricity along its transmission lines for the benefit of its competitors).[24] Although Sections 211 and 212 of PURPA authorize the FERC to mandate wheeling for wholesale customers and suppliers, the provisions were never fully utilized by the FERC due to narrow agency and judicial interpretations of the provisions.[25] The EPAct succeeded in clarifying and broadening the FERC's wholesale wheeling authority. This development was vital to the promotion of wholesale competition because independent power producers could now transmit electricity to its customers using the transmission lines of public utilities without having to own its own transmission lines.

3. Order No. 888

The FERC further increased access to transmission lines for independent power producers through Order No. 888. On April 24, 1996, the FERC issued Order No. 888, which required all public utilities that "own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service."[26] The order also required functional unbundling, whereby public utilities must take transmission services under the same tariff as their transmission customers; state separate rates for wholesale generation, transmission, and ancillary services; and rely on the same electronic information network that its transmission customers rely on to obtain information about its transmission system when buying or selling power.[27]

To facilitate open access transmission, FERC also issued Order No. 889 on the same day, which required utilities to participate in the Open Access Same-Time Information System (OASIS) electronic

23. *Id.* at 816, 819-20.
24. *Id.* at 819.
25. ENERGY, *supra* note 11, at 719.
26. FERC Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996) (to be codified at 18 C.F.R. pts. 35, 385).
27. *Id.*

bulletin board system.[28] OASIS makes information regarding the availability of transmission capacity available to all customers to ensure that utilities do not unfairly deny access to their transmission facilities.[29]

B. The Results of Federal Policy Developments

Although these federal policy developments have been successful at promoting competition, the benefits of competition have yet to be fully realized by consumers. Increased wholesale competition was supposed to yield significant benefits to consumers in the form of lower retail prices for electricity. With increased competition in the wholesale market, it was projected that "retail prices for electricity would be reduced as much as 6 to 13 percent within 2 years" since customers could now buy electricity where it was cheapest and have it transmitted across long distances along the utilities' transmission lines.[30]

The actual results, in many parts of the country, are that the benefits of competition have been negated by the strain on the nation's system of interconnected high-voltage transmission lines.[31] "By 1990, non-utility generation [of electricity] had grown to supply more than half of the marginal generation capacity added to the industry, and more than 10% of cumulative generation capacity."[32] This increase in power means that significant transfers of electric power between regions are being conducted along the transmission grid. The transmission grid was not designed for this enormous increase in the flow of electricity and, as a result, problems have occurred in the form of transmission congestion, otherwise known as bottlenecks.[33] Transmission lines in certain parts of the country are often at full capacity and often exceed safety limits.[34] There exists an ever-present risk of power shortages and blackouts, which only cost consumers more money.[35] For example, "a brief power shortage [in New York City] led to a spike in prices that added an estimated $100 million to ratepayers' bills."[36] The results are that the benefits of competition have not been realized in many parts of the country. Transmission congestion denies consumers access to

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28. FERC Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996) (to be codified at 18 C.F.R. pt. 37).
29. *Id.*
30. ENERGY, *supra* note 11, at 717.
31. Behr, *supra* note 1.
32. ENERGY, *supra* note 11, at 719.
33. Behr, *supra* note 1.
34. *Id.*
35. *See id.*
36. *Id.*

cheaper electricity from distant suppliers and may increase electricity prices due to power shortages and blackouts.

C. The FERC's Response

In recognition of the growth of the electricity generation and the new stresses on the transmission grid, the FERC issued Order No. 2000, which provided for the formation of regional transmission organizations (RTOs) responsible for providing full and open access to all market participants in its region.[37] The FERC sought to ensure that customers realize the benefits of competition and believed that non-discriminatory open access transmission was the key to doing so. Order No. 2000 required all public utilities that own, operate, or control interstate transmission facilities to file with the FERC, by October 15, 2000, a proposal to participate in an RTO with the minimum characteristics and functions specified in the order or to describe the efforts it is taking to participate in an RTO.[38] The objective is for all transmission owning entities to turn over the control of transmission facilities to RTOs, which will operate such facilities and provide full and open access to all market participants in the region.[39]

An RTO approved by the FERC must contain four characteristics: (1) independence; (2) scope and regional configuration; (3) operational authority; and (4) short-term reliability. [40] FERC also requires eight minimum functions of an RTO: (1) tariff administration and design; (2) congestion management; (3) parallel path flow; (4) ancillary services; (5) OASIS and Total Transmission Capability and Available Transmission Capability; (6) market monitoring; (7) planning and expansion; and (8) interregional coordination.[41]

D. Development of RTOs

Although Order No. 2000 did not require the formation of RTOs, it did require that public utilities file plans for the formation of an RTO or, in the alternative, to file a statement describing their efforts to join an RTO, obstacles to participation, and plans to

37. FERC Order No. 2000, 65 Fed. Reg. 810 (Dec. 20, 1999) (to be codified at 18 C.F.R. pt. 35).

38. *Id.* at 812.

39. *Id.* at 811; For an explanation of FERC Order No. 2000, see Susan N. Kelly & Debra H. Rednik, *FERC Gambles on Transmission: Will Order No. 2000 Spur Voluntary Formation of RTOS Nationwide?*, LEGAL TIMES, Apr. 24, 2000, at 29.

40. FERC Order No. 2000, 65 Fed. Reg. at 811.

41. *Id.*

participate in the future.[42] As a result, many public utilities in the country have already formed RTOs or are in the process of obtaining approval from the FERC for an RTO.[43] Although numerous RTO proposals exist, the FERC has definite plans for four large RTOs: one each in the West, Midwest, Northeast, and Southeast.[44] Some parts of the country are further along in the formation of RTOs than others. In the West, there already exists the California Independent System Operator, Desert STAR (covers the Southwest), and RTO West (covers the Pacific Northwest).[45] The FERC has encouraged Desert STAR and RTO West to merge. In the Midwest, two RTOs exist: the Midwest Independent System Operator and the Alliance Regional Transmission Organization.[46] In the Northeast, there are three RTOs: New York, New England, and PJM ISO.[47] Finally, the RTO proposals in the Southeast consist of GridSouth and GridFlorida. GridSouth currently consists of public utilities in North Carolina and South Carolina.[48] The Southern company, the parent company of utilities in Alabama, Georgia, Mississippi, and north Florida, proposed to create their own RTO, but the FERC denied their request, stating that it would have to join the already existing GridSouth RTO.[49] GridFlorida includes most of Florida, excluding the northwest Florida panhandle.[50] For the Northeast and Southeast regions, the FERC issued orders on July 12, 2001 for the utilities to enter into mediation for the development and implementation of a single RTO in each of those regions.[51]

III. TRANSMISSION EXPANSION AND CONSTRUCTION

The development of federal policy through PURPA, EPAct, and Order No. 888 has successfully increased competition in electricity generation, but very little has been done to expand the transmission

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42. *Id.* at 811-12.

43. For current information on the development of RTOs, see the FERC's website *at* http://www.ferc.gov.

44. FERC, REGIONAL TRANSMISSION ORGANIZATION ACTIVITIES, *at* http://www.ferc.gov/Electric/RTO/post_rto.htm (last visited Mar. 20, 2002).

45. *See FERC/RTOs: Slates October Rulemaking Workshops*, DOW JONES NEWSWIRE, Sept. 26, 2001, *at* http://www.dowjonesnews.com.

46. *Id.*

47. *See* Mirant Corp., *Northeast Power Markets: The Argument for a Unified Grid*, 139 PUB. UTIL. FORT. 36, 36 (2001).

48. Order Provisionally Granting RTO Status, FERC Docket No. RT01-74-000 (Mar. 14, 2001).

49. Bruce W. Radford, *News Digest*, 139 PUB. UTIL. FORT. 12, 14 (2001).

50. Order Provisionally Granting RTO Status, FERC Docket Nos. RT01-67-000 & RT01-67-001 (Mar. 28, 2001).

51. *See* Mediation Report for Southeast RTO, FERC Docket No. RT01-100-000 (Sept. 10, 2001); Mediation Report for Northeast RTO, FERC Docket No. RT01-99-000 (Sept. 17, 2001).

grid in order to meet the demands of increased competition. In the FERC's Notice of Proposed Rulemaking for Order No. 2000, the FERC recognized that the planning and construction of transmission lines are not keeping up with the nation's transmission requirements.[52] Furthermore, the North American Electric Reliability Council (NERC) has revealed that the nation's network of power lines is growing by less than one percent a year.[53] "Business is increasing on the transmission system, but very little is being done to increase the load serving and transfer capability of the bulk transmission system," says NERC.[54]

The FERC sought to change this statistic through the formation of RTOs, which will be responsible for the planning and expansion of transmission lines. However, RTOs are limited in their ability to actually expand transmission facilities.[55] The current structure provides utilities little incentive to invest in transmission lines.[56] Furthermore, state siting processes pose many barriers to an RTO's attempt to construct interstate transmission lines.[57] RTOs, of course, operate under the jurisdiction of the federal government and are subject to the regulatory authority of the FERC.[58] However, transmission line siting has traditionally been under the authority of states, many of which have delegated authority to local governments.[59] Through its power to regulate the certification and siting of transmission lines, states can impose barriers to an RTO's plans to expand the transmission grid.

Due to the many constraints on expansion of the transmission grid, there has been some support for turning over the siting authority to the federal government.[60] States, of course, are against any such proposal and argue that they should have exclusive jurisdiction over transmission siting because of its impact on local communities.[61] The National Association of Regulatory Utility Commissioners (NARUC), a non-profit organization composed of

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52. ENERGY, *supra* note 11, at 767, 773; Regional Transmission Organizations, 64 Fed. Reg. 31,390 (June 10, 1999) (to be codified at 18 C.F.R. pt. 35).

53. Behr, *supra* note 1.

54. Regional Transmission Organizations, 64 Fed. Reg. 31,390; ENERGY, *supra* note 11, at 773.

55. *See infra* Part III.A.

56. *See infra* Part III.B.1.

57. *See infra* Part III.B.2.

58. *See infra* Part II.A..

59. Pierce, *supra* note 16, at 333.

60. *E.g.*, Carl J. Levesque, *Stringing Transmission Lines, Untangling Red Tape*, 139 PUB. UTIL. FORT. 46, 51 (2001).

61. Ronald E. Russell, *Toward Federal / State Regulatory Harmony: Perspective of a State Regulator*, 9 CONN. J. INT'L L. 869, 873 (1994) (explaining the position of state regulatory commissions).

state regulatory authorities that regulate utilities, offered several alternatives to the current state of the law, many of which would allow states to retain exclusive jurisdiction over transmission siting but with additional components to address any disputes over interstate transmission siting.[62] However, it is unlikely that any solution to the problem will be effective without some federal preemption of state jurisdiction in the area of transmission siting.

A. Federal/State Jurisdiction over Transmission

Under current law, there exist a number of limitations on federal jurisdiction over transmission. Section 201 of the Federal Power Act (FPA), enacted in 1935, gives the Federal Power Commission (now the FERC) broad authority to regulate the rates, terms, and conditions of service for the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce."[63] However, states have historically exercised exclusive jurisdiction over transmission siting.[64] When Congress enacted the FPA, it intended to preserve the existing scope of state authority. Section 201 of the FPA states that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."[65] Thus, the Federal Power Act preserves state jurisdiction over transmission siting. Under current law, the FERC has no authority to order a utility to construct transmission facilities, nor can it authorize the construction and expansion of transmission facilities.

1. State Jurisdiction Over Transmission Siting

States vary greatly in the mechanisms used to approve transmission siting proposals, with the authority to site possibly resting with individual local governments, state environmental regulators, or state public utility commissions.[66] For those states that rest siting authority with local municipalities, the siting process is governed by local zoning laws and is adjudicated before courts, zoning hearing officers, boards of appeals, and local governing bodies. However, in other states, the siting process has

62. *Id.* at 878-79.
63. 16 U.S.C. § 824(a) (2001).
64. Pierce, *supra* note 16, at 333.
65. 16 U.S.C. § 824.
66. *See* Sager A. Williams, Jr., Comment, *Limiting Local Zoning Regulation of Electric Utilities: A Balanced Approach in the Public Interest*, 23 U. BALT. L. REV. 565, 598-99 (1994).

been consolidated into a one-stop permitting process that allows state authorities to preempt local governments.[67]

Preservation of state jurisdiction over transmission siting is important because states have a number of interests to protect with regard to transmission siting. Many state siting statutes were enacted in response to the environmental impacts of transmission lines and designed to effectuate a reasonable balance of the need for transmission lines against its health, safety, and environmental impacts.[68] Over the years, the possibility that transmission lines may cause adverse health effects has become a concern.[69] Several initial studies appeared to show a correlation between proximity to high-voltage transmission lines and cancer.[70] Since then, studies have produced conflicting results. One study published by the National Research Council found no evidence that the electromagnetic fields created by transmission lines cause cancer.[71] However, another study published by the National Institute of Environmental Health Studies found some potential correlation between electromagnetic fields and childhood leukemia.[72] Thus, for many landowners, transmission lines represent "locally undesirable land uses" (LULU) and face "not in my backyard" (NIMBY) opposition.[73]

For example, in *Frost v. Public Utility Commission of Texas*, several landowners opposed the Lower Colorado River Authority's proposal to construct a 345 kv line connecting two substations.[74] Approving the proposal, the state Commission found that the line would have a visual impact, but its effect on community values would be minimal.[75] The Commission considered that the transmission line skirted residential developments, avoided historical monuments, would not affect park and recreational areas, and that its route was environmentally sound.[76] These are just some of the many factors that state and local governments must take into account when siting transmission lines.

In addition, the siting of transmission lines must take into consideration the effect on the environment. For example, in

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67. *Id.* at 598.

68. *See, e.g.*, Transmission Line Siting Act, FLA. STAT. § 403.521 (2001).

69. ENERGY, *supra* note 11, at 676.

70. *Id.*

71. *Id.* (referring to NATIONAL RESEARCH COUNCIL, POSSIBLE HEALTH EFFECTS OF EXPOSURE TO RESIDENTIAL ELECTRIC AND MAGNETIC FIELDS (1997)).

72. *Id.*

73. *See* Williams, *supra* note 66, at 584-85, 598; *see also* Pierce, *supra* note 16, at 333.

74. 672 S.W.2d 883, 884 (Tex. App. 1984).

75. *Id.*

76. *Id.*

Florida Power Corp. v. Florida Department of Environmental Regulation, Florida Power Corporation (FPC) appealed the order of the Florida Department of Environmental Regulation (DER) rejecting its application for a wetland resource permit.[77] FPC sought the wetland resource permit so it could use 353.1 cubic yards of fill to support transmission poles.[78] DER rejected FPC's application because it found that the proposed transmission line would have adverse impacts.[79] The adverse impacts included: an impact on endangered and threatened orchids adjacent to the cleared corridor; disturbances to hydric soils and vegetation resulting from tree cutting, installation, and maintenance activities; and a permanent change in the character of the wetland, diminishing the overall productivity of the system and affecting wildlife utilization.[80]

B. Barriers to Transmission Expansion

RTOs are limited in their ability to make the necessary expansion to the transmission grid because the federal government has limited authority to eliminate the many barriers to transmission expansion.[81] Utilities have little incentive to invest in transmission expansion because it will only result in bringing in more competitors. In addition, approval for the siting of interstate transmission lines must be obtained from a number of different local governments, state agencies, and federal agencies, which may take years to accomplish. Furthermore, an RTO proposal to site transmission lines across several states can be thwarted by the denial of a permit by one state or, in some cases, by one local government.

1. Lack of Utility Incentive to Invest

It is widely agreed that one of the main reasons for the lack of construction and expansion of transmission lines is the lack of incentives for utilities to invest in transmission lines. In NERC's Reliability Assessment for 2001-10, it stated: "[u]nless mechanisms are developed to encourage investment in new transmission facilities and siting issues are addressed, few new transmission facilities and reinforcements will be constructed."[82] With the FERC's requirement of open and non-discriminatory access to

77. 638 So. 2d 545 (Fla. 1st DCA 1994).
78. *Id.* at 546.
79. *Id.* at 547.
80. *Id.*
81. *See infra* Part III.A.
82. N. AM. ELEC. RELIABILITY COUNCIL, RELIABILITY ASSESSMENT 2001-2010 5 (2001).

transmission lines, utilities wonder why they should build more transmission lines if it will only bring in more competition.[83] Following the issuance of Order No. 888, there was a drop in investment in new bulk transmission facilities of nearly fifty percent.[84]

2. Siting Issues

Another barrier to construction and expansion of transmission lines is the difficulty of siting transmission lines. The process can be extremely costly and time-consuming. Many state siting statutes require that its public utilities commission (PUC) determine that the construction or expansion of a transmission line is needed before approval will be granted.[85] A state PUC may have a difficult time justifying the construction of a transmission line solely designed for the benefit of wholesale electricity generators, who ultimately will transfer the electricity out of the state and have no duty to serve the residents of that state.[86] As NERC explains,

> if a line is going to go through three different states, the states on either end can demonstrate to their constituents what the benefits of that transmission line will be, but the state in the middle has a very difficult time demonstrating the benefit. So, it's almost impossible to get the line built and approved.[87]

As a result, a state public utilities commission will likely deny granting a certificate of need, which is the first requirement for obtaining approval for the construction of a transmission line.

States also have the power to hinder the construction of transmission lines by delaying approval.[88] In some states, the authority to site transmission lines is delegated to local governments through the application of local zoning laws.[89] If the construction of transmission lines is to extend across state boundaries, an RTO must obtain regulatory approval from both the local and state governments of multiple states. This process could

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83. Lawrence J. Spiwak, *You Say Iso, I Say Transco, Let's Call the Whole Thing Off*, 137 PUB. UTIL. FORT. 38, 39 (1999).

84. *Id.*

85. *See* Bruce W. Radford, *Electric Transmission: Do State Regulators Still Have a Voice?*, 137 PUB. UTIL. FORT. 42, 44 (1999).

86. *Id.*

87. Levesque, *supra* note 60, at 51 (quoting Tim Gallagher, manager of technical services at NERC).

88. Williams, *supra* note 66, at 596.

89. *See* Williams, *supra* note 66, at 598-99.

substantially delay construction and would be extremely costly. It is unlikely that any RTO will be willing to incur such costs. Under the Federal Power Act, the FERC does not have authority to authorize the construction or expansion of transmission lines.[90] Thus, the FERC would be powerless if a state sought to deny approval of the construction or expansion of transmission lines, and it would be powerless to expedite the permitting process.

C. Alternatives Proposed

Due to the many barriers a utility faces when siting transmission facilities across state lines, some would prefer turning over the siting process to the federal government.[91] Proponents argue that only having to deal with one federal entity will streamline the process and cut down on some of the delays.[92] Utilities will not have to deal with the numerous municipalities, counties, and states.[93] Of course, states assert that state regulatory commissions are in a better position to protect the public welfare of their citizens than federal regulators.[94] Federal preemption of state laws and local ordinances will ignore local concerns about adverse health effects, safety hazards, and environmental impacts of transmission lines.[95] Furthermore, a centralized federal process can also involve multiple federal agencies, including the U.S. Forest Service, Park Service, Army Corps of Engineers, and Department of Environmental Protection.[96]

The National Association of Regulatory Utility Commissioners (NARUC) has suggested six different solutions to the jurisdiction issue. In ascending order per the degree of federal preemption, the proposals are:

> Option 1: Exclusive state jurisdiction to certify the construction of transmission facilities within their respective borders.
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> Option 2: Exclusive state jurisdiction to certify the construction of transmission facilities within their respective borders plus a formal mechanism for resolving disputes.

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90. *See infra* Part III.A.
91. Levesque, *supra* note 60, at 51.
92. *Id.*
93. *Id.*
94. Russell, *supra* note 61, at 872.
95. *See id.* at 872-73.
96. Levesque, *supra* note 60, at 51.

> Option 3: Exclusive state jurisdiction to certify the construction of transmission facilities within their respective borders, but require that state decisions comply with federal siting standards.
>
> Option 4: Exclusive state jurisdiction to certify the construction of transmission facilities within their respective borders, but enact federal "antidiscrimination" legislation to enforce the Commerce Clause of the Constitution.
>
> Option 5: Creation of regional siting boards comprised of representatives from each affected state to displace individual state decision making.
>
> Option 6: Creation of federal siting authority with concurrent state jurisdiction.[97]

IV. ANALYSIS AND PROPOSAL

Given the needs of transmission expansion, it is unlikely that states can retain exclusive jurisdiction over transmission siting. Although states certainly have legitimate interests to protect, transmission siting has national ramifications. The expansion of the transmission grid is necessary to eliminate the transmission congestion plaguing many parts of the country. These national ramifications require a collaboration between state and federal authorities and further require states to cede some of their control over transmission siting to federal authorities. In fact, several state public utilities commissioners have recognized this requirement. Thomas Welch, Chairman of the Maine Public Utilities Commission, states "I don't think it's appropriate for states to be able to frustrate the creation of efficiencies that a broader market can achieve."[98]

A. Analysis of Alternatives Proposed

Merely retaining exclusive state jurisdiction but adding other mechanisms will not create a workable solution either. First of all, adding a mechanism for dispute resolution assumes that the courts or other dispute settlement authorities are equipped to resolve these

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97. Russell, *supra* note 61, at 878-89.

98. Carl J. Levesque, *Regulators' Forum: Can FERC and States Unite?*, 139 PUB. UTIL. FORT. 14, 20 (2001).

disputes. Often, it is not a matter of who is right or wrong but a matter of balancing local needs and regional needs. On the other hand, requiring states to comply with federal standards does not leave much in the area of state regulation. This is really complete federal preemption in the guise of state regulation. Third, adding "anti-discrimination" legislation may address the problem of protectionist actions by the states with regard to issuing certificates of need, but it does not address the problem of lack of investment in transmission expansion.

Fourth, the creation of regional siting boards assumes that states will be willing to participate in such a plan. There has been some support for the creation of regional siting boards. Two major electricity restructuring bills before Congress encompass such an idea.[99] These bills propose the creation of multi-state agreements to establish regional transmission planning agencies that will be responsible for coordinating the planning and siting of transmission facilities among the states.[100] Each participating state must vest in the regional transmission planning agency the authority that otherwise would be exercised by the state.[101] Cooperation among states is vital for the agreement to work since the proposal provides that decisions of the agency are made by majority vote.[102] Since the plan requires cooperation among states, the approval process can take just as long, if not longer, than if approval had to be obtained from each local and state government. Another problem is getting the states to enter into such agreements. States may not like the idea of placing the issue of transmission siting to a vote.

It is clear that some federal preemption in the area is needed. Therefore, the proposal to create a federal siting authority along with concurrent state jurisdiction is the best scenario. This proposal would follow along the lines of the Natural Gas Act, which allows the FERC to authorize the construction of natural gas pipelines.[103] One commentator has already proposed that the Federal Power Act be amended to allow the FERC the authority to preempt states and to authorize and order the construction of transmission lines just as it may authorize and order the construction of natural gas pipelines under the Natural Gas Act.[104] However, in order for such a proposal to work, the jurisdictional boundaries between federal and state governments must be specified.

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99. Comprehensive Electricity Competition Act, S. 1047, 106th Cong. § 302 (1999); Electric Consumers' Power to Choose Act of 1999, H.R. 2050, 106th Cong. § 111 (1999).

100. S. 1047 § 302; H.R. 2050 § 111.

101. S. 1047 § 302(c)(2)(C); H.R. 2050 § 111(c)(2)(C).

102. S. 1047 § 302(c)(2)(D); H.R. 2050 § 111(c)(2)(D).

103. 15 U.S.C. § 717(f) (2001).

104. Pierce, *supra* note 16, at 334.

B. Proposal

1. State Reform Measures

It is certain that an effective solution in this area will require collaboration between the federal government and state governments. On the states' part, states can certainly work to improve their own siting processes. States vary greatly in the mechanisms used to site transmission lines. For those states that have delegated the siting authority to local governments, approval for an interstate transmission line is extremely cumbersome. A utility would have to get approval from a number of municipalities, counties, and states. In addition, local governments are ill-equipped to take into account the statewide and regional needs for such a transmission proposal. For this reason, many states have consolidated the siting process into a one-stop permitting process that allows state authorities to preempt local governments.[105]

An example of such a statute is Florida's Transmission Line Siting Act (TLSA).[106] Before the enactment of the TLSA, Florida experienced many of the same problems that RTOs face today, where the siting of transmission lines required approval from several different agencies at the local and state level, making the approval process extremely costly and inefficient. In response, the Florida Legislature established a centralized and coordinated permitting process for the siting of transmission facilities by preempting any law, rule, regulation, or ordinance of the state or a political subdivision. The one-stop permitting process created by the TLSA sought to make the regulatory approval process more efficient and thus reduce the costs associated with transmission line siting.[107]

The TLSA provides that the Public Service Commission is responsible for determining the need for a transmission line upon a request by an applicant or upon its own motion.[108] This determination of need is required before any transmission line is approved under the TLSA. Upon the filing of a complete application, each agency affected by the proposed transmission corridor must file a report on how the proposed transmission corridor will impact matters within its jurisdiction, including an explanation of any permits, amendments, variances, or exemptions

105. Williams, *supra* note 66, at 598.

106. FLA. STAT. §§ 403.52-5365 (2001).

107. *See* Wade L. Hopping & Carolyn Songer Raepple, *A Solution to the Regulatory Maze: The Transmission Line Siting Act*, 8 FLA. ST. U. L. REV. 441, 441-44 (1980) (providing an in-depth look at the history, purpose, and operation of the Florida TLSA).

108. FLA. STAT. § 403.537(1)(a) (2001).

that will be required.[109] The Department of Environmental Protection must then prepare a written analysis of the application, which may include any conditions of certification it believes should be imposed.[110] The final stage is the certification hearing, in which evidence is presented before an administrative law judge. The certification hearing is to be conducted no later than 185 days after the complete application is filed.[111] The administrative law judge then prepares a recommended order within sixty days after the filing of the hearing transcript containing findings of fact, conclusions of law, and recommendations as to the conditions of certification.[112] The final decision to approve in whole, approve with modification, or deny rests with the siting board, which consists of the Governor and Cabinet. Within thirty days after receiving the recommended order, the siting board must make the final decision.[113]

Consolidating the siting process into a one-stop permitting process has many benefits. Substantial costs can be reduced because of the elimination of the multiple approval process. A utility proposing an interstate transmission project will only have to deal with a few state public utility commissions. In addition, delay in siting will be substantially reduced because the statute provides for specified time restraints on the siting process. The Florida TLSA provides a schedule for when certain steps must be taken. Consolidating the approval process with state authorities allows the state authorities to balance the impact of the transmission expansion against not only the local needs, but also the statewide and regional needs. Nevertheless, a consolidated siting process would not ignore local concerns. Local governments have ample opportunities to address their concerns during the process.

2. *Federal Preemption*

However, improvement in state siting processes is not enough to address the many problems associated with siting transmission lines. The one-stop permitting process may substantially reduce the delay and costs associated with siting, but it does not address the issue of unilateral decisions by states to deny certification due to a lack of demonstrated need for the transmission line in its state. Furthermore, state reform of the siting process does not address the

109. *Id.* § 403.526.
110. *Id.* § 403.526(3).
111. *Id.* § 403.527(2).
112. *See id.* § 403.527(3).
113. *Id.* § 403.529.

lack of investment in transmission expansion by utilities. To address this problem, it is clear that states must give up their authority to authorize transmission siting through the granting of certificates of public convenience and necessity. States should not be able to withhold approval of the construction of transmission lines based on a lack of need in their state since this has the effect of burdening interstate commerce. Such protectionist measures are a major impediment to the free flow of electricity.

Thus, the Federal Power Act should be amended to allow the FERC authority to order the construction and expansion of transmission lines and to issue certificates of public convenience and necessity. Allowing the FERC the authority to order transmission expansion would overcome the lack of investment by utilities in transmission expansion. Furthermore, allowing the FERC to issue certificates of public convenience and necessity overcomes any unilateral decision by states to deny approval of transmission siting based on a lack of need for transmission expansion in their state.

However, it is important for states to retain some of their jurisdiction in the area of transmission siting. Although the FERC is responsible for issuing certificates of public convenience and necessity, such approval should be conditioned on the proposal satisfying state siting standards. The location of the transmission line must still be reasonable in light of local zoning laws, environmental regulations, and state comprehensive plans. States should retain the authority to consider the proposed transmission line and determine how the transmission corridor will impact matters within its jurisdiction and to consider whether any permits, amendments, variances, or exemptions will be required.

V. CONSTITUTIONAL IMPLICATIONS

A federal statute that ultimately preempts state siting decisions and increases federal jurisdiction over an area traditionally under the control of states necessarily implicates constitutional issues in the area of the Commerce Clause and the Tenth Amendment. It is clear that under present law, the federal government does not have the authority to order the construction or expansion of transmission lines. States will likely argue against a statute that would allow the federal government to preempt state siting because the construction or expansion of transmission lines necessarily affects local communities. However, any challenge on Commerce Clause or Tenth Amendment grounds will likely fail due to the substantial effect construction or expansion of transmission lines has on interstate commerce.

A. Commerce Clause

Although states will be reluctant to turn over some of their control over transmission siting to the federal government, it is unlikely that an amendment to the Federal Power Act will be overturned on constitutional grounds. Under Article I, Section Eight of the United States Constitution, Congress has the authority to regulate commerce among the states or with foreign nations. The federal government's power to regulate under the Commerce Clause has been liberally construed by the Supreme Court. "[T]he commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce . . . or persons or things in commerce,' but also to 'activities affecting commerce.'"[114] Furthermore, the Court has stated that "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility."[115] Given the interstate aspects of the transmission of electricity, the statute will be upheld under the Commerce Clause so long as the statute demonstrates that it is rationally related to the congressional goal of eliminating barriers to interstate transmission siting.[116] Congress should have no problem with this given the relationship between the problems facing the electricity industry and what the statute will accomplish.

B. Tenth Amendment

Even if the statute is a valid exercise of Congress' power to regulate interstate commerce, another issue a state may raise is whether the Tenth Amendment restricts Congress' power to preempt transmission line siting. In the past, the Tenth Amendment had been read to be a nullity, adding nothing to the Constitution.[117] It was believed that so long as the regulation was within Congress' power under the Commerce Clause, the Tenth Amendment did not restrict Congress' power. However, there has been a recent re-emergence of Tenth Amendment jurisprudence that has limited Congress' power to regulate beyond Commerce Clause restrictions.

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114. FERC v. Mississippi, 456 U.S. 742, 754 n.18 (1982) (quoting a companion case decided the same day).

115. *Id.* at 757.

116. *Id.* at 757 n.22.

117. David T. Woods, Note, *A Step Toward Stability in Modern Tenth Amendment Jurisprudence: The Supreme Court Adopts a Workable Standard in* Printz v. United States, 42 ST. LOUIS U. L. J. 1417, 1420 (1998) (explaining the history of the Tenth Amendment).

1. Recent Tenth Amendment Jurisprudence

The re-emergence of the Tenth Amendment began with *National League of Cities v. Usery*, in which the Supreme Court held that the 1974 amendments to the Fair Labor Standards Act (FLSA) violated the Tenth Amendment.[118] The amendments expanded the FLSA's requirement of minimum wage and overtime pay for private sector employees involved in the production of goods for commerce to include all employees of the states and their subdivisions.[119] Although the Court conceded that minimum working conditions for employees had an impact on interstate commerce, the Court nevertheless held that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[120] Certain functions such as fire and police protection have been traditionally provided by the states and federal power cannot intrude on the states' freedom to structure integral operations in areas of traditional state government function.[121]

In 1985, in the case of *Garcia v. San Antonio Metropolitan Transit Authority*, the Court retreated from its previous decision and held the test under *National League of Cities* to be unworkable.[122] The case involved the application of the FLSA to transit authority employees, who argued that the setting of wages and hours for employees of the Transit Authority was a state government function and should not be intruded upon by the federal government.[123] The Court found that it was impossible to determine what was an integral and traditional function of state government and held that true protection of the states resides in the political process, thus overruling *National League of Cities*.[124]

Finally, in *New York v. United States*, the Court reestablished its commitment to the Tenth Amendment.[125] The case involved the Low-Level Radioactive Waste Policy Amendments Act of 1985, which provided three incentives for states to take responsibility for waste generated within their borders. Of the three incentives, the

118. 426 U.S. 833 (1976).
119. *Id.* at 837.
120. *Id.* at 845.
121. *Id.* at 845-52.
122. 469 U.S. 528, 546-47 (1985).
123. *Id.* at 533.
124. *Id.* at 546-47.
125. 505 U.S. 144 (1992).

Court held the take title provision to be invalid.[126] The provision required the states to either regulate according to the federal program or "take-title" to the waste.[127] The Court held that Congress can provide incentives, but it lacks the power to coerce or compel the states to require or prohibit any act.[128] Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[129]

2. Application of the Tenth Amendment

The problem found in the above cases is that a federal regulation sought to mandate states to implement a federal government program. It is unlikely that an amendment to the Federal Power Act, giving the FERC authority to order transmission expansion and to issue certificates of public convenience and necessity, would be held to violate the Tenth Amendment. Such a statute would not coerce or compel a state to implement a federal program, it would merely preempt the states in that area.

A similar program was analyzed by the Court in *FERC v. Mississippi*, in which the Supreme Court upheld parts of PURPA in the face of a Tenth Amendment challenge.[130] Section 210 of PURPA was challenged on the basis that it required states to enforce standards promulgated by the FERC in the development of cogeneration and small power facilities and authorized the FERC to exempt such facilities from state and federal regulations.[131] Insofar as Section 210 exempts qualifying facilities from state laws and regulations, the Court held that it is doing nothing more than preempting the states.[132] Preemption is valid so long as it is a valid exercise of the commerce power. The "Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important."[133] Thus, a statute that merely precludes states from regulating in the area is merely an exercise of federal preemption and not a violation of the Tenth Amendment.

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126. *Id.*
127. *Id.* at 152-53.
128. *Id.*
129. *Id.* at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).
130. 456 U.S. 742, 758-71 (1982).
131. *Id.* at 759.
132. *Id.*
133. *Id.*

In addition, the requirement of Section 210 that "each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule . . . for each electric utility for which it has ratemaking authority," is simply requiring that the state adjudicate disputes arising under the statute.[134] The Court held that dispute resolution is a type of activity customarily engaged in by a state public service commission.[135] Therefore, this requirement was not a violation of the Tenth Amendment because it did not place any additional burdens on the states.

On a similar note, the proposal outlined here merely preempts states with regard to issuance of certificates of public convenience and necessity. The Court has held that preemption is valid so long as it does not violate the Commerce Clause. In addition, the proposal would not place any additional burdens on the states since states already have in place a permitting process by which they review transmission siting proposals. Therefore, it is unlikely that an amendment to the Federal Power Act will be overturned on Tenth Amendment grounds.

V. CONCLUSION

Transmission lines are vital to the implementation of the wholesale market for electricity. Although the construction and expansion of transmission lines has an impact on local concerns such as health, safety, and environmental impacts, transmission lines have an effect on residents of other states as well. Transmission congestion is a real and current problem, and the construction of more transmission lines is necessary to ensure that the transmission grid will be able to meet the needs of increased power. States will have a difficult time retaining exclusive control over an area that has such national and far reaching implications. Thus, an amendment to the Federal Power Act increasing the FERC's jurisdiction over transmission siting is necessary to eliminate the many barriers to transmission expansion.

134. *Id.* at 759-60.
135. *Id.* at 760.